INTERIOR BOARD OF INDIAN APPEALS

Terese L. Garrett v. Assistant Secretary - Indian Affairs

13 IBIA 8 (08/21/1984)

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Reconsideration denied:
13 IBIA 31

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TERESE L. GARRETT
v.
ASSISTANT SECRETARY FOR INDIAN AFFAIRS

IBIA 84-20-A Decided August 21, 1984

Appeal from a decision of the Assistant Secretary for Indian Affairs refusing to issue a fee patent or to confirm title to the mineral interests in certain lands held in Indian trust status.

Affirmed; referred to Bureau of Indian Affairs.

1. Board of Indian Appeals: Jurisdiction

   Although the Board of Indian Appeals does not have general review jurisdiction over decisions of the Assistant Secretary for Indian Affairs, 43 CFR 4.330 permits the Assistant Secretary to refer any matter concerning Indians to the Board.

2. Indians: Citizenship

   American Indians born in Canada have an aboriginal right to pass the boundary between Canada and the United States and to remain in the United States without compliance with any immigration law that would apply to any other alien.

3. Indian Lands: Allotments: Alienation--Indian Lands: Restricted Allotment

   The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance

was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

4. Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

The Board of Indian Appeals will refer a case to the Bureau of Indian Affairs in accordance with 43 CFR 4.337(b) when the decision involves the exercise of discretion committed to the Secretary.

APPEARANCES: Terese L. Garrett, Esq., pro se; Michael D. Cox, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On February 13, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Terese L. Garrett (appellant), seeking review of a December 16, 1983, decision of the Assistant Secretary for Indian Affairs (Assistant Secretary) (appellee). Appellee refused either to issue a fee patent to appellant or to confirm her claimed title to the mineral interests in certain lands held in Indian trust status. For the reasons discussed below, the Board affirms that decision, and refers this case to the Bureau of Indian Affairs (BIA) for a determination of whether the deed upon which appellant bases her claim should be retroactively approved.

Background

On March 30, 1954, Thomas Bokas, Sr. (Thomas Bokas), now deceased Fort Peck 206-No. 8667, executed a deed of the oil, gas, and other mineral rights

in four tracts of Indian trust land on the Fort Peck Reservation in Montana to John F. Bayuk and Terese Lowney. 1/ There is apparently no dispute that Terese Lowney and appellant, Terese Garrett, are the same person, or that she is non-Indian. The deed was allegedly intended as payment for legal services rendered to Thomas Bokas, Jr. Although this deed was recorded in the official records of Roosevelt County, Montana, it was not presented to the Secretary of the Interior (Secretary) for approval as required by 25 CFR 152.17 and the statutes cited in that regulation. 2/

Thomas Bokas died on June 7, 1974. Probate of his estate was concluded by the Department of the Interior (Department) on November 17, 1975. Thomas Bokas left a will under which his Indian trust property was devised to Helen Iron Bear Brown; his son, Thomas Bokas, Jr.; and his grandson, Marvin Dean Taylor. The mineral interests purportedly conveyed to appellant were not excepted from the inventory of trust real property filed in the estate.

On December 15, 1982, appellant filed a petition with the Superintendent, Fort Peck Agency, BIA, in which she sought approval of the 1954 mineral deed or the issuance of a fee patent for the mineral interests. An amended petition and brief of points and authorities were filed on January 26, 1983.

1/ The tracts involved in this transaction and the interest in each tract are: One-third interest in sec. 35, T. 29 N., R. 50 E., Principal meridian, Montana; one-fifth interest in W 1/2 NW 1/4 sec. 3, T. 30 N., R. 50 E., Principal meridian, Montana; one-fifth interest in SW 1/4 sec. 3, T. 30 N., R. 50 E., Principal meridian, Montana; and seven-eighths interest in S 1/2 sec. 16, T. 31 N., R. 49 E., Principal meridian, Montana, containing a total of 1,200 acres more or less, Roosevelt County, Montana.

2/ It appears that on Apr. 29, 1954, John F. Bayuk and his wife and Terese Lowney executed a deed to Mary E. Hughes covering all of these mineral interests, except that the deed on S 1/2 sec. 16, T. 31 N., R. 49 E., Principal meridian, Montana, was limited to one-third of their seven-eights interest.

The Superintendent denied the petition on April 6, 1983. Appellant's subsequent appeals of this decision were denied by the Billings Area Director, BIA, on July 7, 1983, and by appellee on December 16, 1983. Pursuant to instructions contained in appellee's decision, appellant filed a notice of appeal with the Board. Briefs on appeal have been filed by both parties and Marvin Dean Taylor submitted a letter on his own behalf.

Jurisdiction

[1] The Board does not have general review authority over decisions of the Assistant Secretary. See 43 CFR 4.330(a)(1); Ute Mountain Ute Tribe v. Acting Assistant Secretary for Indian Affairs, 11 IBIA 168, 90 I.D. 169 (1983); Willie v. Commissioner of Indian Affairs, 10 IBIA 135 (1982). It can, however, review those decisions that are specifically referred to it by the Secretary or the Assistant Secretary, 3/ or in which a right of appeal to the Board is given in the decision itself. 4/ In this case, appellee's decision letter concludes with the following paragraph: "This affirmation of the Billings Area Director's decision, having been based on interpretation of law, will become final 60 days from receipt hereof unless an appeal is filed with the Board of Indian Appeals pursuant to 43 CFR Part 4, Subpart D." Board jurisdiction in this case is, therefore, based upon the right of appeal given to appellant in appellee's decision.

3/ See 43 CFR 4.330(a)(2); Pueblo of Laguna v. Assistant Secretary for Indian Affairs, 12 IBIA 80, 90 I.D. 521 (1983).

4/ See Melsheimer v. Assistant Secretary for Indian Affairs, 11 IBIA 155, 90 I.D. 165 (1983).

Discussion and Conclusions

Appellant seeks a determination that Thomas Bokas was a Canadian national who never acquired United States citizenship. Because she believes that Thomas Bokas was not a citizen of the United States, appellant argues that he was not an Indian for whom the United States could hold land in trust and that, therefore, the trust status of any Indian trust property he inherited in the United States terminated upon transfer to him. Consequently, appellant argues that Thomas Bokas could make this conveyance to her without approval by the Secretary, and that the mineral interests covered by the deed constitute a dry and passive trust as described in Bailess v. Paukune, 344 U.S. 171 (1952), and Chemah v. Fodder, 259 F. Supp. 910 (W.D. Okla. 1966). Appellant thus contends that the only duty remaining in BIA is to issue her a fee patent.

The citizenship of Thomas Bokas and his father, William Bokas, was specifically addressed by the Department in 1955. On January 5, 1955, an Assistant Secretary of the Interior ordered the reopening of the estate of William Bokas to determine whether he was a Canadian national. The estate was reopened by a Departmental Examiner of Inheritance who found:

> The decedent, William Bokas, was born in the vicinity of the Fort Peck Dam in May, 1874. His father, Bokas and his mother, Good Road, were Sioux Indians and members of the Sitting Bull Band. Some time during the period 1875-1877, his parents, as well as many other Sioux Indians, fled with him across the Canadian border to Wood Mountain, Saskatchewan, due to serious difficulties with U.S. Army troops, commonly referred to as the Northwest Rebellion. Bokas married Brown Cloud (also known as Bear Woman) about the year 1902, there being two sons and three daughters born of this union; Thomas Bokas is the oldest of these children. Following the death of his Canadian wife, the decedent

> returned to the Fort Peck Reservation, Montana, with his son Thomas, either in 1915 or 1916. They both remained in the United States from that day and neither has been enrolled or allotted on any Indian reservation in the United States. There is indication that William Bokas made an application at the Fort Peck Agency which was denied.
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> In 1921, William married Emma Afraid of the Bear Chotowiza, a Fort Peck allottee. Upon her death on October 10, 1937, he inherited several interests in trust lands from her. This property is located on the Fort Peck Reservation, Montana and the Crow Creek Reservation, South Dakota. It is these interests which constituted his entire estate upon his own death, November 18, 1951, and his son Thomas was determined to be his sole heir.

(Order Determining Jurisdiction, June 30, 1955, at 1).

The Examiner found that William Bokas became a United States citizen pursuant to the Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253, 8 U.S.C. § 3 (1934). 5/ Appellant does not dispute that William Bokas was a United States citizen.

The Examiner also found that Thomas Bokas acquired United States citizenship by virtue of section 5 of the Act of March 2, 1907, ch. 2534, 34 Stat. 1228, 1229, which provides:

> That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child: And provided further,

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5/ This Act states:

"That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."

This provision has been carried over into 8 U.S.C. § 1401(b) (1982).

> That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Appellee admits that this finding was in error to the extent that the 1907 Act has been judicially determined to apply only to children who were residing outside the United States when their parent was naturalized and who subsequently legally moved to the United States during their minority. See United States ex rel. Patton v. Tod, 297 F. 385 (2d Cir. 1924); see also 38 Op. Att'y. Gen. 217 (1935); 38 Op. Att'y. Gen. 397 (1936). Appellee argues, however, that this constitutes harmless error, because Thomas Bokas acquired United States citizenship under the Act of April 14, 1802, ch. 28, 2 Stat. 153, 155, which provides at section 4:

> That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States * * *.

Section 5 of the 1907 Act and section 4 of the 1802 Act were held in Tod, supra at 393, to be complementary:

> Giving to the two statutes under consideration this interpretation, we have a simple system under which each statute confers rights in two different situations. Under R.S. U.S. § 2172 [section 4 of the 1802 Act], a foreign-born minor child dwelling in the United States at the time of the naturalization of the parent automatically becomes an American citizen. Under section 5 of the Act of March 2, 1907, a foreign-born child, not in the United States when the parent is naturalized, becomes a citizen only from such time as, while still a minor, it begins to reside permanently in the United States. [Emphasis added.]

Appellant admits the operation of these statutes, but argues that Tod requires that a minor child must be residing in the United States legally in order to receive United States citizenship through the naturalization of a parent. She contends that there has been no showing that Thomas Bokas was legally in the United States because neither he nor his father on his behalf ever complied with the applicable rules governing the obtaining of immigrant status. Appellant argues that immigrant status is a necessary prerequisite to an alien's legal residence in the United States.

Whether or not Thomas Bokas was legally residing in the United States in 1924 when his father acquired United States citizenship may be determined by reference to the Jay Treaty of 1794, 8 Stat. 116, and subsequent historical events. The Jay Treaty, among other things, established the boundary between the United States and Canada. The boundary line passed through the territories of several Indian tribes; e.g., the Micmac, Maliseet, Penobscot, and Passamaquoddy Indian Tribes of Maine and New Brunswick (Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974)), the Iroquois Nation of New York and Ontario (United States ex rel. Diabo v. McCandless, 18 F.2d 282 (E.D. Pa. 1927), aff'd, 25 F.2d 71 (3rd Cir. 1928)), and the Sioux of Montana and Saskatchewan (the present case). Article III of the Jay Treaty states:

> It is agreed that it shall at all times to be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * * .

Apparently, United States immigration officials allowed Canadian-born Indians to cross the international boundary and to remain in the United States without the restrictions applicable to other aliens until 1924, when the Immigration Act of 1924, ch. 190, 43 Stat. 153, was passed. Immigration officials then began deporting Canadian-born Indians. This practice was challenged in Diabo, supra. The Immigration Service argued that the Jay Treaty had been abrogated by the War of 1812, and that the right of free passage guaranteed there to Indians no longer existed. Without deciding whether the Jay Treaty had been abrogated, the district court held that the treaty had not created a right of passage, but had merely recognized the aboriginal right of American Indians to reside in a territory spanning the boundary line. The appellate court affirmed the district court's decision, but held specifically that the Jay Treaty had not been abrogated by the War of 1812.

In 1928, Congress enacted the predecessor to the present 8 U.S.C. § 1359 (1982). That Act stated: "That the Immigration Act of 1924 shall not be construed to apply to the right of American Indians born in Canada to pass the borders of the United States: Provided, That this right shall not extend to persons whose membership in Indian tribes or families is created by adoption." Ch. 308, 45 Stat. 401. The legislative history of this section indicates that it was intended to correct the Immigration Service's interpretation of the immigration laws. See 69 Cong. Rec. 5581-82, 70th Cong., 1st Sess. (Mar. 29, 1928). This section was amended so that it presently reads: "Nothing in this subchapter [dealing with immigration] shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."

This section was construed in Akins, supra. As does appellant here, the Attorney General argued in Akins that the right guaranteed to American Indians was only to "pass" the border, but did not extend to the right to remain in the United States without complying with other immigration procedures. Thus, the Attorney General contended that American Indians could not be required to obtain immigration visas as a precondition to entry into the United States, but that they could be required to comply with alien registration requirements.

The Akins court concluded, however, at pages 1219 and 1221:

> The intent of Congress in enacting Section 1359 was to preserve the aboriginal right of American Indians to move freely throughout the territories originally occupied by them on either side of the American and Canadian border, and, thus, to exempt Canadian-born Indians from all immigration restrictions imposed on aliens by the Immigration and Nationality Act.
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> * * * [A]ny consistent and coherent construction of the language of Section 1359 compels the conclusion that the words "to pass" are not to be given either a literal or a technical construction and that Section 1359 exempts these Indians from the restrictions imposed on aliens by the immigration laws. [Emphasis in original.]

[2] The citizenship of Thomas Bokas must be determined in conjunction with this background. The Departmental Examiner of Inheritance found that Thomas Bokas was born in Canada and moved to the United States with his father in 1915 or 1916. This move was before the passage of the Immigration Act of 1924, and at a time when immigration officials apparently recognized the right of American Indians to cross the international border and to remain in this country without immigration restriction. There was, therefore, no

doubt that Thomas Bokas and his father were both legally residing in the United States in 1915 or 1916. Assuming, arguendo, that the Immigration Act applied retroactively to aliens residing in the United States at the time of its passage, both the courts and Congress have recognized that American Indians born in Canada have an aboriginal right to pass the international border and to remain in this county without compliance with any immigration law that would apply to any other alien. 6/ Based upon these precedents, we conclude that the legality of Thomas Bokas' residence in the United States was not affected by the 1924 Immigration Act.

It is, therefore, clear that Thomas Bokas legally resided in the United States from the time he first entered with his father until the date of his death. When William Bokas became a citizen of the United States on June 2, 1924, by virtue of the Indian Citizenship Act of 1924, Thomas Bokas, his Canadian-born minor child residing in the United States, automatically became a citizen through section 4 of the Act of April 14, 1802. Because Thomas Bokas was a citizen of the United States and an American Indian, he was a person for whom the United States could hold land in Indian trust status. 7/ Therefore, appellant's argument that Thomas Bokas was a person who could

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6/ The record contains an undated, but apparently recent, newspaper article indicating that it may still be the position of the Immigration Service that Canadian-born American Indians must comply with post-entry immigration requirements.

7/ See Appellee's Answer Brief at 11:

"It is the Department's long-standing policy to continue the trust or restricted status of inherited property so long as the heir or devisee is of Indian descent, even though such person may not be entitled to membership in any Indian tribe nor be eligible for federal services provided by the Bureau of Indian Affairs."

The Federal trust responsibility runs to Indians, not merely to members of Indian tribes.

alienate the lands inherited from his father without the approval of the Secretary is without merit.

[3] The finding that Thomas Bokas was a citizen of the United States and an American Indian, however, does not end this controversy. That finding merely leads us to conclude that Thomas Bokas was an Indian for whom the United States held land in trust and that, accordingly, he was not competent without the approval of the Secretary to enter into the deed under which appellant seeks relief. As noted in appellee's decision letter and addressed in appellant's filings, the Secretary has the authority to approve a deed of Indian trust land retroactively. The Board discussed this authority in Wishkeno v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 21, 32, 89 I.D. 655, 661 (1982). The Board there concluded:

> [T]he Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. Such approval will be applied retroactively to the date of the attempted conveyance and will extinguish third-party rights arising after the date of the conveyance, including rights acquired through inheritance or devise.

[4] The Secretary, through his delegates in BIA, has not had an opportunity to consider the question of whether this deed should be retroactively approved. Accordingly because the approval of such a deed is discretionary with the Secretary, the Board will refer this case to BIA under 43 CFR 4.337(b) for such a determination. See Prieto v. Acting Sacramento Area Director, 11 IBIA 124 (1983); Wishkeno, supra. Appellant is reminded that she bears

the burden of proving that the transaction was such as would permit retroactive approval. Appellant's burden in this matter is increased by the fact that, as Thomas Bokas' attorney, she was in a confidential relationship with him.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Assistant Secretary for Indian Affairs is affirmed, and this case is referred to the Bureau of Indian Affairs for consideration of whether the March 30, 1954, deed executed by Thomas Bokas, Sr., should be retroactively approved. The BIA decision on this matter shall be final for the Department unless properly appealed as a violation of law in accordance with the provisions of 25 CFR Part 2 and 43 CFR Part 4, Subpart D.

//original signed
Jerry Muskrat
Administrative Judge

We concur:

//original signed
Bernard V. Parrette
Chief Administrative Judge

//original signed
Anne Poindexter Lewis
Administrative Judge